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IN THE

Supreme Court of the United States

October Term, 1972.

72-155

~~No. 71-1076~~.

JOHN BALLANTYNE,

Petitioner,

v.

CENTRAL RAILROAD OF NEW JERSEY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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CENTRAL RAILROAD OF NEW JERSEY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner, JOHN BALLANTYNE, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit rendered in these proceedings on May 3, 1972.

OPINIONS BELOW.

The opinion of the United States Court of Appeals, as yet unreported, appears at Appendix A. The Appellate Court vacated the judgment of the United States District Court for the Eastern District of Pennsylvania and remanded the cause for a new trial on the issue of damages.

JURISDICTION.

The order or judgment of the United States Court of Appeals for the Third Circuit was entered on May 3, 1972. See Appendix A, p. 8, *infra*. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under the Act of Congress, April 22, 1908, ch. 149, 35 Stat. 65, and amendments thereto, 45 U. S. C. A. § 51, et seq.

QUESTIONS PRESENTED.

Is not a general verdict in an F. E. L. A. case proper where it contains an award for present worth of future lost wages, where the trial court fully instructed the jury and gave it guidelines and an illustrative example as to how to compute the present worth of such future lost wages? There is a diametric conflict between several Circuits in this question.

STATEMENT OF FACTS.

On May 5, 1965, and for a long time prior thereto, petitioner was employed as a freight conductor by the defendant railroad company. At the abovementioned time, in the course of his duties, petitioner released an admittedly defective brake, and was thrown from the boxcar on which he was standing. The injuries which resulted from this accident were serious, permanent, partially disabling and disfiguring. They required three hospitalizations involving surgical procedures, and kept petitioner out of work for approximately twenty months.

As a result of the aforementioned injuries, petitioner can never again return to the freight service of the railroad, but is relegated to work as a passenger conductor. At the time of the trial the petitioner was 42 years of age and was earning approximately $6,250.00 per year less than he would have been earning if he were still in the freight service. He could have worked for 23 more years before he reached the mandatory retirement age.

At the trial there was admittedly no evidence presented by petitioner as to the interest rates available for safe, conservative investment. The court, however, charged that the jury was to use six percent as the rate of interest in their computations for reduction to their present value. This charge reflected the trial court's concern that the jury not be left free to return a verdict based upon sheer conjecture and guess work. Accordingly, the judge instructed the jury as follows:

> ". . . if you find the plaintiff is entitled to recover for any lost earning capacity from the date of today, you will determine what that loss is, reducing the award to its present worth.

Present worth is a sum which, if paid on the date of your verdict, would then be a just cash equivalent of the sum total of such future earning capacity destroyed. It is such a sum as placed at simple interest which will, together with the accumulations of interest, amount to such damages at the time in the future when the jury finds from the evidence that they will be sustained. Interest is computed at the legal rate of 6 percent, and both principal and interest must be consumed in the process.

This might sound confusing to you, but actually the matter is not too difficult, and if you are given an illustration, it will easily clear it up for you.

Now, an example is properly charged to you if I make it clear that the example is illustrative only in that it is solely for the jury to decide what the verdict is to be. . . .

When a sum of money is to be paid to a person as due him on a date certain in the future, if that sum is placed in his hands today, he will be able to invest that money so that when the debt is due he will have not only the debt sum but the interest on it as well.

If we assume that a debtor will owe me a dollar one year from today and he hands me the dollar now, when the debt is not due, I can invest the dollar and to the end of the year when the debt is actually due I will actually have received $1.06, 6 cents more than the debt. Therefore, if he wishes to discharge the obligation now rather than wait until the end of the year, the debtor will hand me approximately 94 cents. Then, when I invest that sum at 6 percent interest I will have the full amount of the debt at the end of the year.

In such a case as I have given you the 94 cents would be the present worth of the dollar due. This is precisely the process which is involved when you come to an award and award lost earnings in the future. It would be unjust to the defendant for you to total up the periodic payments to which the plaintiff would be entitled and then award that total since the plaintiff has the ability to invest the money as I have just stated."

In F. E. L. A. cases it is a jury question as to what is a safe, prudent rate of interest, but in the present case the petitioner got the benefit of a ruling as a matter of law which instructed the jury to deduct for present value at the very high rate of six percent. The trial court gave the jury explicit guidance as to how to compute the future lost wages to present worth and the jury subsequently returned a verdict for petitioner in the amount of $180,000.00.

On appeal, the United States Court of Appeals ordered the judgment vacated, saying that "The application of the present worth rule is generally conceded to be beyond the understanding and capabilities of most lay persons serving on juries. . . . [and that] in determining the amount of compensation the jury should not be left free to roam between confusion and conjecture". Thus, despite the judge's clear and detailed explanation of the present worth rule, the Appellate Court remanded the case for a new trial on the issue of damages.

REASONS FOR GRANTING THE WRIT.

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1. Since the Trial Court in This F. E. L. A. Action Fully and Properly Instructed the Jury and Gave It Guidelines and an Example as to How to Compute the Future Lost Wages to Present Worth, the Verdict Is Properly Based on the Charge of the Court and the Law, and Is Not a Verdict Based on Conjecture or Guesswork.

In discussing damages, the plaintiff argued to the jury (4a), and had evidence to support a future loss of gross earnings of about $143,750. In addition, there are claims for medical costs, hospitalizations, and the initial period of twenty months off of work, and horrible pain and suffering. There is also a claim made for the difference in income from the time the plaintiff returned to work until the date of the trial. All in all, plaintiff proved damages of approximately $200,000, without any consideration of pain and suffering. Hence, the verdict of $180,000 was not, by any means, a large recovery in this case.

Appellant relied on the two recent decisions of *Russell v. City of Wildwood*, 428 F. 2d 1176 C. A. 3 (1970), and *Haddigan, Adm. v. Harkins*, — F. 2d — C. A. 3 (1970). Both of these were diversity cases. *Russell* was based on an accident occurring in New Jersey, and *Haddigan* was based on an accident occurring in Pennsylvania. Both *Russell* and *Haddigan* hold that a jury is entitled to receive "actuarial evidence or guidance" (Italics ours).

In *Russell, supra*, at page 1183, the court said:

> "Here the trial judge properly defined present worth, but he left the determination of that sum to the jury without any evidence *or* guidance as to how they were to compute it." (Emphasis supplied.)

It is imperative to note that the court, in *Russell, supra,* stated that tables, actuarial evidence, or guidance must be given to the jury. The court used the disjunctive, *or,* between "any evidence" and "guidance". Thus, the court was saying that the jury must be given guidance in some form as to how to compute present worth. The trial court, in *Russell, supra,* did not give the jury *any* guidance whatsoever. What the trial court did in *Russell* was simply define the doctrine of present worth, but did not, in any way, give the jury any instructions on how to compute it, nor did it give any example or other explanation. It was a barren statement.

In the case at bar, the trial judge properly showed the jury how to apply the principle of present worth. He defined it and he gave examples. It is this *guideline* that the Court of Appeals was referring to in *Russell, supra.* In *Russell,* the trial judge did not give a guideline to the jury with respect to the rate of interest it ought to apply, nor was there any evidence as to what rate of interest ought to be applied. The trial judge in the instant case told the jury to apply six percent interest factor. In the instant case, in contrast to the charge in *Russell, supra,* the trial judge properly, fully, and adequately explained the example of giving a dollar, which is really giving a dollar and six cents if given at the present time, and not due until the end of the year. He then properly told the jury that approximately ninety four cents would be sufficient, if given today. He further explained that this was precisely the process which is involved when calculating an award which process must be followed when assessing future lost earnings. He explained the unfairness to the defendant if the jury would simply total up the periodic payments, and not reduce them to present worth. It becomes manifestly clear that the *guidelines* required by *Russell* were not given in the *Russell*

case, but certainly were supplied by the trial judge in the instant case.

In any event, the holdings of *Russell* and *Haddigan* are not the law of this case. This is an action based on a federal statute (The Federal Employers Liability Act), and presents to the court a federal question. What the law may be for a diversity case in which state law is applied may or may not be the law where a federal question is presented. Despite any rule to the contrary that may or may not exist in a diversity case coming out of New Jersey or Pennsylvania, actuarial evidence of present worth of future lost wages is not required in an F. E. L. A. case, *Chesapeake and Ohio Railroad Co. v. Kelly*, 241 U. S. 485, at page 489, 36 S. Ct. 630, at page 633, and cases following. In *Thompson v. Camp*, 163 F. 2d 396, at page 403, the Court of Appeals for the Sixth Circuit held that while future losses must be reduced to present value *in an F. E. L. A. case*, it has never been required that actuarial evidence be given to the jury (in an F. E. L. A. case).

In *Pennsylvania Railroad Co. v. McKinley*, 288 F. 2d 262, the defendant raised exactly the same issue, namely, that there was no evidence of the present value of future losses for the guidance of the jury. The court squarely held, in that F. E. L. A. case, that such evidence is admissible, but not essential. The court refused to grant a new trial, and stated that it was within the province of the jury to reduce the award to present value.

> "Expert evidence as to earning power of money safely invested is admissible in Federal Employers Liability Act case, but is not essential to award for future loss of earning power and pain and suffering."

The rule promulgated in both *Russell* and *Haddigan* was merely corrective of the inadequate charges in those cases. The trial judges in those cases did not adequately

explain the principle of present worth to the jury, nor did the trial judges explain how to apply the principle, nor did they give examples. The trial judge in the instant case, however, did all of those things. However, even if the *Russell* and *Haddigan* rules were of general application, which they seem not to be, then the rule still does not apply to Federal Employers Liability Act cases.

The highest authority directly on point is *Kelly v. Chesapeake and Ohio, supra,* U. S. S. Ct., where the court did require that future losses be reduced to the present value, but did in no way indicate or hold or require that any actuarial evidence or present worth tables be presented to the jury.

The instant case is substantially different from *Russell* and *Haddigan.* In the instant case, the trial judge gave the jury a six percent figure to work with. The trial judge adequately and fully defined the principle of present worth, explained its application, dissected its reasoning, gave examples to the jury, and told it the method by which to calculate it. Even though *Russell* and *Haddigan* do not apply to this F. E. L. A. action, the criterion of adequate "guidelines" to the jury was met by the trial judge's charge nonetheless, even if this were a mere diversity case.

In *Haddigan, supra,* there was a petition filed for a rehearing. The rehearing was denied. But in a dissenting Opinion, Judge Aldisert recognized the very position that is maintained by the petitioner in the instant case. He stated that in Federal Employers Liability cases such as the instant one, admission of actuarial evidence or present worth tables is not required. He said:

> "Indeed, even in federal question cases, the admission of such evidence is not required. In *Pennsylvania Railroad Co. v. McKinley,* 288 F. 2d 262, 265 (Sixth Cir. 1961), an action under the Federal Employers Liability Act. . . ."

Thus, what Judge Aldisert, in effect, said, was that he disagreed with the result in *Haddigan* and *Russell,* and that the same rule should be applied in diversity cases as exists in Federal Employers Liability cases, as stated in *McKinley, supra.*

The ruling of the Court of Appeals for the Third Circuit in the present case cast into confusion the issue of exactly what guidelines must be given to a jury in an F. E. L. A. case as to how to compute future lost wages to present worth. *McKinley, supra,* clearly set out the standard that has long been accepted in F. E. L. A. cases; that while expert evidence is admissible, it is not essential. This standard is in direct contravention with the holding of the case at bar, which not only fails to make clear exactly what evidence is required, but also ignores the distinction between the state standards applicable in diversity cases and the federal standard which is to be applied in an F. E. L. A. case.

CONCLUSION.

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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June 23, 1972.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1076

JOHN BALLANTINE
v.
CENTRAL RAILROAD OF NEW JERSEY,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 17, 1972
Before ADAMS, JAMES ROSEN, *Circuit Judges,* and STAPLETON, *District Judge*

Opinion of the Court.
(Filed May 3, 1972)

ROSEN, J., *Circuit Judge.*

This appeal from a general jury verdict entered in an F. E. L. A. case presents the sole question of whether the jury was given sufficient guidance to allow it to reduce future lost earnings to their present worth.

Plaintiff John Ballantine, a freight service employee of Central Railroad of New Jersey, was injured while at work on May 5, 1965 in Middletown, N. J. The accident occurred while plaintiff was releasing an admittedly defective brake on a boxcar. He was thrown from the brake step

onto the ground, injuring his head and fracturing his wrist and elbow. Hospitalization was required, and lost work time approximated 20 months. Ballantine is presently working for Central as a passenger trainman.[1] At the time of trial, he was 42 years of age, and was earning approximately $6,250. per year less than he would have been earning had he remained in the freight service.[2] It was stipulated that the mandatory retirement age from the railroad is sixty-five years of age for both passenger and freight service employees.

Evidence was presented of loss of gross future earnings plus medical costs and of pain and suffering covering the initial injury and subsequent corrective treatment. Absent from the record is any testimony by an actuary on the method of reducing future earnings to present worth. Plaintiff did not introduce present worth tables. In his closing statement to the jury, plaintiff made no mention of the necessity of the jury to reduce future loss of wages in the amount they determined to their present worth.[3] At the close of trial, defendant requested the court not to charge

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1. The residual effects of plaintiff's injuries prevent him from resuming his duties in freight service.

2. Appellant's Appendix, p. 4a.

3. Mr. Grant: "* * *
Now, that brings us only until today.
Now John Ballantine today—today—is forty-two years old. It has been agreed by both sides that the mandatory retirement age on the railroad is sixty-five for both passenger and freight. He is a young man. He has a lot of living to do yet. He has twenty-three more years to work for the railroad.

* * *

Now, you multiply—and I am not talking about inflation or anything else. Forget about that; that's not important. You multiply twenty-three years times $6,250. a year less he is earning now than he would have been earning if he were still climbing boxcars and throwing switches and doing things like that on the freight service, and that comes to $143,750. Now let's talk about the future medical."

* * *

Appellant's Appendix, p. 4a.

the jury on future loss of wages, contending that there had been no evidence as to the manner in which it should be reduced to present worth.[4] The court denied defendant's motion and proceeded to charge the jury, including instructions on the concept of the present worth of future lost earnings. In explaining this principle, the court used a simplified 6% example of a one dollar debt to be paid one year later.[5] The jury returned a verdict of $180,000. Defendant

4. The following discussion took place between court and counsel at side bar regarding the question whether the jury should be charged as to future loss of wages:

Mr. Littleton: In connection with the charge, I would move that there be no charge.

The Court: No what—?

Mr. Littleton: No charge as to future wage loss and reducing to net worth because there has been no evidence to enable this jury to reduce future wage loss to present worth. It would have to be pulled right out of the air and a guess and a conjecture how many dollars a year lost is worth now for how many years.

Mr. Grant: Sir, I think that's certainly a proper matter to leave up to the jury with proper instructions as to reducing to present value; but there need not be any evidence presented by anybody at all on that subject.

The Court: Well there is evidence that he is going to have pain as long as he lives.

Mr. Littleton: This relates to future wage loss.

The Court: Yes, and there is evidence that he can't do what he used to do as a freight conductor, and there is evidence as to diminution of earnings. Now there is evidence that that will continue as long as he lives. I think that there is enough there to warrant a charge.

5. "If we assume that a debtor will owe me a dollar one year from today and he hands me the dollar now, when the debt is not due, I can invest the dollar and to the end of the year when the debt is actually due I will actually have received $1.06, 6 cents more than the debt. Therefore, if he wishes to discharge the obligation now rather than wait until the end of the year, the debtor will hand me approximately 94 cents. Then, when I invest that sum at 6 percent interest I will have the full amount of the debt at the end of the year.

"In such a case as I have given you the 94 cents would be the present worth of the dollar due. This is precisely the process which is involved when you come to an award and award lost earnings in the future."

Appellant's Appendix, p. 7a.

filed a motion for new trial, and briefed the issue of whether or not the court's instruction on present worth was a proper and adequate charge. The motion was denied without opinion. This appeal followed.

The application of the present worth rule is generally conceded to be beyond the understanding and capabilities of most lay persons serving on juries. At the very least, it is a tedious and laborious task. The involved process of reducing future losses to present worth has, undoubtedly, led to confusion and guesswork verdicts. Reason, logic and fairness would, therefore, dictate that enlightenment is necessary. This court has already addressed itself to the need for such enlightenment in federal diversity cases.

In *Russell v. City of Wildwood,* 428 F. 2d 1176 (3rd Cir. 1970), the issue presented was whether it was legally sufficient for a plaintiff to introduce a life expectancy table in order to illustrate to the jury how they could determine the plaintiff's gross future earnings, without offering them further guidance on how to reduce those earnings to their present worth, other than to tell them that that sum was to be reduced by them "to present worth, as the Judge will explain to you." In *Russell* there was no evidence as to what interest could be fairly expected from safe investment which a person of ordinary prudence but without particular financial experience and skill could make, nor was there any guidance given to the jury as to the method of computing, on the basis of that interest rate, the present value of the plaintiff's total future earnings loss as determined by them. The court held that the jurors were entitled to receive evidence and appropriate mathematical guidance with respect to these matters if they were to act rationally and not upon mere conjecture or guess. Such guidance as to the mathematical computation could have been provided through the testimony of a mathematical expert or through tables or formulas of which the court could have taken judicial notice.

"In the absence of any evidence or other guidance as to how they were to compute the present worth of the plaintiff's loss of future earnings, we can only conclude that this portion of the jury's verdict was based upon sheer conjecture."

In *Haddigan v. Harkins,* 441 F. 2d 844 (3d Cir. 1970) actions were brought for wrongful death and survival by the administrator of the estate of a deceased automobile passenger against drivers of two other automobiles. At trial plaintiff sought recovery for lost future earnings less cost of maintenance, but offered no evidence from which the jury could have made the computation of present worth. The court held that the complete absence of any actuarial evidence or other guidance from which the jury could have made the calculation of present worth required by the damage charge in both the survival action and wrongful death action constituted a substantive defect requiring a remand of the case for a retrial of the damages. "They were * * * entitled to receive evidence and appropriate mathematical guidance with respect to these matters if they were to act rationally and not upon mere conjecture or guess", citing *Russell, supra.*

Tabor v. Miller, 389 F. 2d 645 (3d Cir. 1968), does not support a contrary result. *Tabor* held that while mortality tables and technical data are admissible in Pennsylvania, on the issue of life expectancy, they are not required, citing *McCaffrey v. Schwartz,* 285 Pa. 561, 132 A. 810 (1926). *McCaffrey* was specifically overruled by the Supreme Court of Pennsylvania in *Brodie v. Philadelphia Transportation Co.,* 415 Pa. 296, 203 A. 2d 657 (1964). While present worth tables were not used in the *Brodie* case, it was admitted that the actuary's testimony was in the same mould and had the same effect. The court noted that the present worth rule was not an easy rule for juries to apply, and that some enlightenment was necessary, pointing to the use of accepted

tables or the testimony of a qualified expert as possible sources of such enlightenment. "Moreover, the amount of future damages warranted by the evidence and the law in a given case is a mathematical fact. There is no logical reason why it should not be established by proof like other relevant facts."[5A]

In the instant case no evidence was introduced in the way of present worth tables or any other mathematical formula or computation that the jury could use once it had determined the amount of loss or gross future earnings. The one dollar due in one year example included by the judge in his charge demonstrated what "present worth" is but offered no guidance to the jury as to the proper mathematical calculations required to reduce Ballantine's lost future earnings covering a 23 year period to their present value.

The record in this case, like *Russell*, contains evidence of lost future earnings. The parties stipulated the retirement age from the railroad. Evidence was offered to show an annual diminution of earnings by $6,250.00. Plaintiff closed to the jury on this issue by multiplying the number of years of plaintiff's work expectancy with Central by the annual loss of earnings figure, arriving at a gross figure of $143,750. No other evidence was introduced on the method of reducing lost prospective earnings to present value. Under these circumstances, the award of damages cannot stand. We hold that once evidence is presented and recovery is sought for future lost earnings, the jury is entitled to receive evidence and appropriate mathematical guidance on the method of reducing lost future earnings to present

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5A. Life expectancy and mortality tables are readily available. The latter tables disclose a present value of a dollar due at the end of each year during the life of a person of specified age. The use of one or more of these tables with proper instructions to the jury will obviate appeals in this class of cases.

worth, if they are to act rationally and "not upon mere conjecture and guess."

That this is an F. E. L. A. case does not prohibit such a holding.[6] The underlying philosophy of tort law that allows pecuniary recovery for injuries, even after they have healed, is that plaintiff should be compensated for harm he has suffered. Restatement, Torts, § 902.[7] A change in this philosophy is not produced merely because jurisdictional grounds other than diversity are alleged. In determining the amount of compensation, the jury should not be left free to roam between confusion and conjecture. "The defendant is entitled to a charge which will direct the jury's attention to every item and consideration which may substantially reduce the plaintiff's loss so that the jury does not charge the defendant with a loss which the plaintiff would never have to suffer. Even-handed justice requires nothing less than this." *McWeeney v. New York, N. H. & H. R. Co.*, 282 F. 2d 34 (2d Cir. 1960), at 40 Lumbard (dissenting).

Appellee attempts to keep the issue of present worth from being raised in this court by contending that, since the error of inadequate guidance was not specifically alleged in appellant's motion for new trial, appellant should be barred from raising the issue on appeal.[8] We need only observe that it is unnecessary for appellant to assign as grounds for a new trial the ruling of the district court in order to have

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6. We have read the briefs in *La Morte v. Penn Central Transportation Co.*, 450 F. 2d 956 (3d Cir. 1971). Both parties presented expert actuarial evidence as to the present value of La Morte's lost future wages. This court held there was sufficient guidance to allow the jury to reduce his lost future wages to their present worth.

7. Cf. *U. S. ex rel. Jones v. Rundle*, 453 F. 2d 147, 150, note 11 (3d Cir. 1971).

8. As previously noted, appellant briefed and argued the issue presented on this appeal in support of its motion for new trial. The court was adequately apprised of appellant's views on this point in ruling on appellant's motion.

appellate review, because there is no obligation to file such a motion. *Trout v. Pennsylvania R. R. Co.*, 300 F. 2d 826 (3d Cir. 1962); *Woods v. The National Life & Accident Insurance Co.*, 347 F. 2d 760 (3d Cir. 1965). In federal practice any question which has been presented to the trial court for a ruling and not thereafter waived or withdrawn is preserved for review. *Ryerson & Son, Inc. v. H. A. Crane & Brother, Inc.*, 417 F. 2d 1263 (3d Cir. 1969).[9]

For the foregoing reasons the judgment of the district court will be vacated and the cause remanded for a new trial on the issue of damages.

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9. See also *Wagner v. Reading Co.*, 428 F. 2d 289, 290 (note 2) (3d Cir. 1970); *United States v. Harue Hayashi*, 282 F. 2d 599 (9th Cir. 1960).